Who benefits from the exploitation of non-living resources on the seabed?

Who benefits from the exploitation of non-living resources on the seabed? Operationalizing the benefit-sharing provisions in the UN Convention on the Law of the Sea

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July 2015: Technological developments over the past half century have dramatically increased the ability of mankind to exploit the oceans. Whilst most marine activities once took place relatively close to the safety of the shore, exploitation is now taking place further and further out into the open oceans. Modern drilling rigs can operate up to 3500 metres below the surface of the sea and companies are looking to expand their oil and gas operations into deeper water in the Gulf of Mexico, off the West coast of Africa, the East coast of Canada and in the Arctic waters of Russia and Norway. At the same time, other companies are developing the technology that will allow them to carry out seabed mining operations for mineral deposits such as polymetallic nodules, polymetallic sulphides and cobalt rich crusts, at even greater depths. These resources are found on the deep seabed floor and they are potentially a source of important and valuable minerals, such as cobalt, manganese, copper and rare earth elements.

These technological advancements also raise the question of whether it is only those states

or companies that can afford this technology that should benefit from its application, or whether the benefits should be distributed more equitably. In fact, this is a debate that began in the 1960s and 1970s during the negotiation of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Aware that they were in danger of being left behind in the technological surge, the developing states taking part in those negotiations were concerned to ensure that seabed resources should not be subject to exploitation by the richest countries alone. The need to achieve "a just and equitable international economic order which takes into account the interests and needs of mankind as a whole" was ultimately accepted as an objective of the Convention (see preamble) and the concept of benefit-sharing was enshrined in the Convention in relation to both continental shelf resources beyond 200 nautical miles and seabed resources in the deep seabed beyond national jurisdiction. However, many details of the benefit-sharing regime were left to future negotiation and it remains part of the "unfinished business" of the law of the sea regime. As the exploitation of these resources becomes a reality, the international community will have to deal with these issues. This blogpost will provide a concise overview of the relevant UNCLOS provisions, drawing attention to the manner in which benefit-sharing has been implemented in the Convention, as well as those issues that require further clarification and elaboration.

Sharing the Benefits of Deep Seabed Mining

UNCLOS designates the deep seabed beyond national jurisdiction ("the Area") as the common heritage of mankind. (UNCLOS, Article 136) One of the consequences of this designation is that deep seabed resources must be exploited for the benefit of mankind as a whole. An international organization, the International Seabed Authority, has been set up to oversee the implementation of the deep seabed mining regime in the Convention. The work of the Authority to date has been concerned with establishing the conditions upon which states or companies can apply for authorization to carry out deep seabed mining activities in areas beyond national jurisdiction. Another important aspect of the Authority's mandate is to:

"provide for the equitable sharing of financial and other economic benefits derived from activities in the Area…" (UNCLOS, Article 140)

Furthermore, the Authority is involved in ensuring that other benefits are distributed, such as the transfer of technology or scientific and technical knowledge (UNCLOS, Article 144) Thus, UNCLOS (even as modified by the 1994 Implementing Agreement) clearly anticipates the sharing of both financial, economic and other benefits arising from the use of the Area. However, the precise nature of benefit-sharing is left to be decided by the Authority at a later date.

In relation to deep seabed mining, the Authority has principally addressed the issue of benefit-sharing through the drafting of regulations for prospecting and exploration of seabed mineral resources. At the present stage of operations, when there is currently no commercial exploitation of resources, the focus has largely been on the sharing of non-economic benefits. For example, contractors are expected to positively contribute to benefit-sharing through the provision of training and capacity building activities to assist developing states who wish to participate in activities in the Area. Contractors are required by both UNCLOS

and the regulations to draw up "practical programmes for the training of personnel of the Authority and developing States." (UNCLOS, Annex III, Article 15) The precise de programme must be worked out in discussions between the Authority and contractors. In practice, such opportunities have included at-sea training in sampling techniques and analysis, engineering training in using advanced technology and bursaries for further study, but the details vary on a case-by-case basis. To help promote consistency, the Authority has produced recommendations for the guidance of contractors and sponsoring States relating to training programmes under plans of work for exploration.

With the commercial exploitation of deep seabed resources expected to commence within the next ten years or so, it is likely that the debate will shift to financial and economic benefits to be shared during these operations. The Authority is just beginning to draft regulations for the exploitation of deep seabed minerals. One of the issues that the Authority will have to consider is the nature of the payments to be made by contractors during this phase of operations. The Secretariat's report on the development of the regulatory framework produced for the 2013 session of the Authority envisages a form of royalty payment and it highlights a number of different possibilities, including (a) unit-based royalties based on units of volume or weight; (b) ad valorem royalties based on value of sales; (c) hybrid royalties; (d) profit-based royalties. It remains to be seen which model will be selected, but the Authority will have to reach an agreement on this issue soon, in order to put regulations in place before the first commercial exploitation occurs. Whichever option is chosen will dictate the scale of the financial benefits to be derived from the exploitation of seabed resources and therefore this is a central issue in the future of the benefit-sharing regime for seabed resources beyond national jurisdiction.

The Authority must also consider the question of how to distribute the money that it obtains from commercial contractors. UNCLOS is vague on what precisely is required, as it refers to the development of "an appropriate mechanism [for the sharing of financial and other economic benefits] on a non-discriminatory basis […]" taking into particular consideration "the interests and needs of developing States and peoples who have not gained full independence or other self-governing status." (UNCLOS, Article 140) This wording gives a large degree of discretion to the Authority in determining who precisely is to receive the benefits of deep seabed mining. This is a very difficult question and it raises complex questions of distributive justice. How should competing claims to benefits be judged?

It is notable that the distribution of benefits is not necessarily restricted to States Parties to the Convention and the Authority can consider more creative ways in which to distribute the benefits of seabed mining for the benefit of mankind as a whole. Indeed, the Authority has already displayed some creativity in distributing the surplus of fees paid by pioneer investors (those contractors which had registered an interest in deep seabed mineral resources prior to the entry into force of the Convention) by setting up an endowment fund aimed at promoting and encouraging the conduct of marine scientific research in the Area for the benefit of mankind as a whole, which is particularly focused on "supporting the participation of qualified scientists and technical personnel from developing countries in marine scientific research programmes and by providing them with opportunities to participate in international technical and scientific cooperation" (see the relevant resolution of the Authority) This approach ensures that the benefits of seabed mining are targeted at promoting technical

assistance and capacity building with a view to the long-term development of developing countries. Alternatively, the monies could be directed to other types of developme possibly channelled through other international institutions, such as the World Bank. Finally, the money could be used to invest in marine environmental protection, thereby recognising the importance of marine ecosystem integrity for achieving other development goals.

Sharing the Benefits from the use of Non-living Resources in the Outer Continental Shelf

Under UNCLOS, coastal states have sovereign rights to the resources on their continental shelves up to the edge of the continental margin. However, these sovereign rights are not unfettered. The Convention imposes an obligation on the coastal state to:

"make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." (UNCLOS, Article 82)

The inclusion of this provision for the sharing of benefits earned from the exploitation of outer continental shelf resources was a result of disagreements about the extent of sovereign rights that should be possessed by coastal states. Thus, this benefit-sharing obligation serves as a quid pro quo for the recognition of the sovereign rights of coastal states beyond 200 nautical miles.

The benefit-sharing provision applies to all types of non-living natural resources, including oil, gas, and mineral resources located on the outer continental shelf. However, the precise operation of the benefit-sharing regime raises a number of issues that require further elaboration. The Authority has commissioned studies and conducted workshops in order to identify a number of issues that need to be resolved.

Firstly, payments or contributions with regard to the exploitation of the outer continental shelf resources are to be made through the Authority. This mechanism assumes some sort of legal relationship between the Authority and the coastal state, although the precise nature of that relationship is left undetermined.

The scope of obligations imposed upon the Authority is also unclear. The text would suggest that the Authority is simply a receiver of payments or contributions and the Authority does not have an explicit mandate to monitor the exploitation activities of coastal states. Thus, the Authority is put in a position whereby it relies upon the provision of accurate and timely information by the coastal state in relation to exploitation activity on the outer continental shelf. However, there is a danger that coastal states could frustrate the benefit-sharing process by not providing sufficient information. This would appear to be a gap in the regime that could usefully be filled through either an amendment to the Convention, an interpretation of its terms, or a decision of the States Parties.

Another issue arises in relation to the nature of the benefit shared by the coastal state. It would appear that a coastal state has the option to make a contribution in kind instead of a payment. In other words, the coastal state may choose to transfer a proportion of the

resource to the Authority, instead of making a financial payment. However, such an approach raises a number of administrative and logistical issues, which would need to be worked out in practice. Who would be responsible for the transportation and storage of the contributions? Would the Authority be required to sell the contribution immediately or must it exercise a fiduciary duty to ensure that it gets a reasonable return on the sale of contributions?

As in the case of revenues from deep seabed mining, the final and potentially most difficult issue to be addressed is how to distribute the benefits arising from the exploitation of outer continental shelf resources. The Authority is mandated to "distribute [the benefits] to States Parties … on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them." This indicates that the beneficiaries of these resources are more limited than the beneficiaries of deep seabed resources, as only States Parties are to benefit. Thus, a distinct benefit-sharing mechanism must be set up for the purposes of the outer continental shelf regime. It will be up to the Authority, however, to decide what are appropriate equitable sharing criteria. It is also questionable whether the Authority must distribute resources directly to States Parties or whether they can be distributed via development institutions in order to ensure that their funds are used to the benefit of mankind.

To date, the Authority has identified the issues that would need to be resolved in order to operationalize the benefit-sharing regime under Article 82, but it has yet to start deliberations on how to solve them. Much work therefore remains to be done.

What comes next?

Even though the concept of benefit-sharing is firmly embedded in the existing UNCLOS regimes relating to seabed resources, further work is still necessary in order to fully operationalize these regimes so that mankind as a whole really can reap the benefits of seabed resources. Whilst some progress has been made since the entry into force of UNCLOS in 1994, it is clear that many issues remain unresolved. In particular, the question of how to distribute the financial benefits to be derived from the relevant resources raise controversial questions of distributive justice. The parameters of the benefit-sharing regimes are ambiguous and there are as many controversial policy issues as there are complex legal issues that will have to be considered during negotiations.

It is ultimately the Authority that will have the final say on what constitutes an equitable sharing of benefits under both regimes. The complex decision-making procedures of the Authority, including the voting rules and requirements for approval by different organs of the Authority, will therefore be important in determining the outcome of the process. It must also be noted that membership of the Authority is not universal. There are currently 167 Members of the Authority and so this institution does not necessarily represent all members of the international community. Landlocked states, who may be considered potential beneficiaries of the proposed benefit-sharing regimes, are particularly underrepresented at present because many of them have not yet become a party to the Convention. In order to ensure that the decision on an equitable benefit-sharing regime is legitimate, it is imperative that these states and other underrepresented elements of the international community are

brought into the decision-making process at an early opportunity.

* This blog post does not necessarily reflect the views of the BENELEX team.

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